

**UNITED STATES GOVERNMENT  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 26**

**UNITED STATES COLD STORAGE, INC.**  
Employer

and

**ROBERT JOYNER**  
Petitioner

**Case 26-RD-1131**

and

**UNITED FOOD AND COMMERCIAL  
WORKERS LOCAL NO. 1995**  
Union

**SUPPLEMENTAL DECISION AND CERTIFICATION OF RESULTS OF ELECTION**

Based on a petition filed March 20, 2006 and pursuant to a Decision and Direction of Election issued by the Regional Director for the Twenty-sixth Region on April 17, 2006, an election by secret ballot was conducted on May 12, 2006, among certain employees<sup>1</sup> of the Employer. The results of the election, as disclosed by the Tally of Ballots served on the parties,<sup>2</sup> were as follows:

Approximate number of eligible voters . . . . .	37
Number of void ballots . . . . .	0
Number of votes cast for the Union . . . . .	10
Number of votes cast against participating labor organization. . . . .	25
Number of valid votes counted . . . . .	35
Number of challenged ballots. . . . .	0
Number of valid votes counted plus challenged ballots . . . . .	35

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<sup>1</sup> **Including:** All warehouse employees, maintenance employees and leadmen employed at the Employer's Interchange City and Smyrna, Tennessee locations. **Excluding:** All office clerical employees, professional employees, guards and supervisors as defined in the Act.

<sup>2</sup> At the conclusion of the election, representatives for the Employer and Petitioner, but not the Union, signed and received the tally of ballots. As a result, a copy of the tally of ballots was served on the Union by letter dated May 16, 2006.

On May 19, 2006, the Union filed timely objections to conduct affecting the results of the election, a copy of which was duly served on the Employer and Petitioner. A copy of the Union's objections is attached hereto. Pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, the undersigned has caused an investigation of the objections to be made and having considered the results thereof, reports as follows:

### **THE UNION'S OBJECTIONS**

The Union filed two objections.<sup>3</sup> The first objection claims that the Employer created an atmosphere of intimidation because normally visible Union literature was reversed and thus unseen by employees in the break room where the voting took place. The second objection contends that the Employer had two observers during each of the two voting sessions while the Union only had one observer, which was contrary to the parties' election arrangements.

In support of its objections, the Union presented a non-Board affidavit from Larry Buggs, the Director of Packing and Processing for the Union. No other witnesses or evidence was presented by the Union in support of its objections.

#### Objection 1:

Mr. Buggs stated that he attended the pre-election conference for observers on the day of the election. While there were two voting sessions, one at Smyrna, Tennessee and the other at Interchange City (Laverne), Tennessee, there was only one pre-election conference. It was conducted in the break room of the Employer's Smyrna facility before the first voting session. The break room at each location also served as the voting area for the election.

During the pre-election conference, Buggs noticed that Union literature on the bulletin board in the break room had been reversed, which meant that it was no longer visible to employees.<sup>4</sup> Buggs stated that for years Employer approved Union literature had been posted on the bulletin board in the break room and that he inquired immediately as to who reversed the literature. The Board agent conducting the election responded that she had reversed the literature. Buggs asked the Board agent why she had reversed the literature. The Board agent replied, “. . . she did not want anything about the Union visible in the voting area,” according to Buggs.<sup>5</sup> There is no evidence that any voters, other than the three observers, were present at the time. Further, there is no evidence as alleged in the initial objections that the Employer reversed any Union literature on its bulletin boards.

Mr. Buggs avers that about a dozen Employer representatives were present during the pre-election conference and wore buttons that read, “Vote No.” There is, however, no evidence that any of the Employer representatives were in the voting area wearing their “Vote No’ buttons during the time designated for employees to vote.

The Board is empowered to safeguard its electoral processes from conduct that inhibits the free exercise of employee choice. *Boston Insulated Wire & Cable, Co.*, 259 NLRB 1118 (1982). One such safeguard the Board has implemented is that electioneering at or near the polls during election hours is

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<sup>3</sup> The Union does not cite any case law to support either of its objections.

<sup>4</sup> No evidence was presented concerning the subject matter of the Union literature.

<sup>5</sup> No evidence was presented indicating the Employer or Petitioner had literature in the break room.

prohibited. Id.; Section 11326 of the National Labor Relations Board Casehandling Manual Part Two Representation Proceedings (CHM). As a means of enforcing its no electioneering rule, the Board will even set aside an election on the basis of any prolonged conversations between employees waiting in line to vote and representatives of a party to the election because the few minutes before an employee votes should be his/her own and free from interference. Id. citing *Milchem Inc.*, 170 NLRB 362 (1968).

In the instant matter, the Board agent reversed visible Union literature posted on the bulletin board in the voting area immediately prior to commencement of the polling in an effort to curtail what she perceived as possible electioneering. There is no evidence, nor does the Union contend, that Union literature was reversed while Employer and/or Petitioner literature was not reversed.

The conduct of Board agents in representation cases must be beyond reproach and “must not tend to destroy confidence in the election process.” *Athbro Precision Engineering Corp.*, 166 NLRB 966 (1967). Here, assuming the Board agent acted in an overly cautious manner in policing the voting area, it was not done in the presence of any voters other than the parties’ observers. Under the circumstances presented herein, I cannot conclude that the Board agent’s conduct created the appearance that the election process would not be fairly administered.

The Employer’s representatives wearing “Vote No” buttons to the pre-election conference is also not objectionable because the pre-election

conference was prior to voting hours and thus only the parties' observers were present. Moreover, there is no evidence that any Employer representative wore a "Vote No" button in the voting area during voting hours at either voting location. Thus, I find that Objection 1 lacks merit and it is overruled.

Objection 2:

On April 25, 2006, a confirming letter from the Resident Office memorializing the parties' election arrangements was sent to representatives of the Union and the Employer as well as to Robert Joyner, an employee of the Employer who filed the petition.<sup>6</sup> The letter sets forth the parties' agreement to utilize one observer per party per voting session. Prior to the election no party expressed any objection to each of the three parties having one observer.

In support of this objection, Mr. Buggs stated he attended the pre-election conference. Attendees to the pre-election conference signed a sign in sheet. One of the signatures for the Union was Buggs while the only signature for the Petitioner was Joyner.

Buggs further stated that after the election polls closed at the Smyrna location, he returned to the voting area for the sealing of the ballot box. He observed ". . . the Company had two observers, while the Union was afforded only one observer. . . ." In the break room was David Kookan, observer for the Employer; Robert Joyner, observer for the Petitioner; and Billy Cauthen, observer for the Union.

At the conclusion of the voting session at the Employer's Interchange City (Laverne), Tennessee, facility, Buggs entered the voting area for the counting of

the ballots. He again noticed three observers in the break room: Robert Joyner for the Petitioner, someone he did not know for the Employer, and Mark Johnson for the Union.

The Union maintains that Robert Joyner served as an additional observer for the Employer along with David Kooker at the Smyrna facility and with another employee unknown to the Union at the Interchange City (Laverne) facility. It is the Union's position that since Mr. Joyner filed the Petition to decertify the Union and the Employer embraced that position, then in reality Joyner, the Petitioner, and the Employer are the same rather than separate parties thereby breaching the parties' agreement of one observer per party.

Section 11002.2 of the CHM designates that an employee of an employer can file a RC or RD petition. The National Labor Relations Board's Rules and Regulations Section 102.69(a) and CHM Section 11310.1 sets forth that each party may be represented at the polling place and that each party have the same number of observers during the election. Each party is also allowed to choose its own observer. CHM Section 11310.2.

Robert Joyner, in this case, is an employee of the Employer who filed the instant petition and thus became the Petitioner. As such, Joyner is afforded the same rights and privileges associated with the election process as the Employer and the Union. Therefore, Joyner had the right to have an observer present at each voting session and had the right to choose himself to be that observer.

The position taken by the Union that the Petitioner and the Employer are one party is based solely upon its claim that the Employer embraced the

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<sup>6</sup> The letter identified the representatives of each of the three parties.

Petitioner's efforts. That argument is simply insufficient to establish that the two separate parties are actually one. This determination is strengthened by the Union's failure to object to Mr. Joyner serving as an observer prior to or during the pre-election conference.

Therefore, based upon the above the Union has failed to meet the "heavy" burden of proof required to set aside a Board supervised election and I find Objection 2 to be without merit and it is overruled. *Safeway, Inc.*, 338 NLRB 525 (2002) quoting *Kux Mfg., Co. v. NLRB*, 890 F.2d 804, 808 (6<sup>th</sup> Cir. 1989).

### **CONCLUSION**

Having overruled the Union's objections in their entirety, and as the tally of ballots reflects the Union has not received a majority of the valid votes cast, I shall certify the results of the election.

### **CERTIFICATION OF RESULTS OF ELECTION**

NOW, THEREFORE, pursuant to the authority vested in the undersigned by the National Labor Relations Board, IT IS HEREBY CERTIFIED that a majority of the valid ballots have not been cast for any labor organization and that no labor organization is the exclusive representative of these employees in the bargaining unit described below:

INCLUDED: All warehouse employees, maintenance employees and leadmen employed at the Employer's Interchange City and Smyrna, Tennessee locations.

EXCLUDED: All office clerical employees, professional employees, guards and supervisors as defined in the Act.

Dated at Memphis, Tennessee this 16<sup>th</sup> day of June, 2006.<sup>7</sup>

A handwritten signature in cursive script that reads "Ronald K. Hooks". The signature is written in dark ink and is positioned above a horizontal line.

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Ronald K. Hooks, Regional Director  
National Labor Relations Board  
Region 26  
The Brinkley Plaza Building  
80 Monroe Avenue- 3<sup>rd</sup> Floor  
Memphis, TN 38103-2416

Attachments

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<sup>7</sup> Under the provisions of Section 102.69 and 102.67 of the Board's Rules and Regulations, a Request for Review of this Supplemental Decision may be filed with the Board in Washington, D.C., by June 30, 2006. Pursuant to Section 102.69(g) of the Board's Rules, documentary evidence, including affidavits, is not part of the record before the Board unless appended to the Request for Review which the party files with the Board. Any party may waive its right to request review by signing the attached waiver form and submitting it to the Board with a copy to the Regional Director.